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No. 97-914

Supreme Court, U.S.
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In The Supreme Court of the United States

October Term, 1997

JERRY JEFFERSON,

Petitioner,

v.

BERTSCH A/K/A BERTSCH & COMPANY, AND PARK CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PERCEIVED MISSTATEMENTS OF FACT

Pursuant to Rule 15, Section 2, the following are perceived misstatements of fact in the petition for writ of certiorari.

A. Contrary to Petitioner's assertion, the judgment in the Mississippi action was not entered against Park Corporation or Bertsch, its unincorporated division. It was entered only against Bertsch & Company.

On page 8, Petitioner asserts: "The Mississippi Judgment is against Bertsch, not the dissolved Bertsch & Company." This is contrary to the Final Judgment entered in the Mississippi Action (29a).[1] In that Final Judgment, which was submitted by Petitioner's counsel, the Court held it had, "Personal jurisdiction over Defendant Bertsch & Company" because "Bertsch & Company committed a tort in whole or in part within the State of Mississippi. (Id ¶ 1) The court found that Bertsch & Company was properly served (Id ¶ 3), and entered judgment against Bertsch & Company (31a). Nowhere in that final judgment is there any mention or reference to Park Corporation or Bertsch its unincorporated division. (29-31a)

The Seventh Circuit held: " . . . the Judgment of the Circuit Court of Hinds County, Mississippi was against Bertsch & Company, not Park/Bertsch." (5a).[2] The District Court also held that judgment was entered only against Bertsch & Company. (7a, 15a)

In making this determination, the Seventh Circuit stated, "Moreover, Jefferson plainly represented to the Mississippi court that the judgment was sought against the 'dissolved' 'Bertsch & Company' as opposed to asking for a judgment against Park/Bertsch." (4a)

The District Court made the same conclusion. In its first Entry, the District Court found: "Also as Defendant notes, the

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[1]References to (a) are to the page of the appendix attached to the Petition.

[2]Because the courts below referred to Park Corporation and its unincorporated division, named Bertsch, as "Park/Bertsch," that same terminology is used in this brief.

attorney in the underlying action clearly represented to the Mississippi Court that the judgment was sought against the 'dissolved' 'Bertsch & Company' as opposed to Park's unincorporated division." (21a) In its second Entry, it stated, "In the instant case, however, the Plaintiff certified to the Mississippi court that it was seeking judgment against 'Bertsch & Company' a 'dissolved' corporation." (11a)

These rulings are based on the fact that Petitioner's counsel, to obtain a default judgment against Bertsch & Company, filed an affidavit in which he swore under oath that service was made on Bertsch & Company, which was "administratively dissolved," and that Petitioner was seeking judgment against Bertsch & Company. (See Appendix B-1 attached hereto.)

In light of this affidavit of Petitioner's counsel and based on the language of the Final Judgment, which was submitted by Petitioner's counsel, there is no basis to assert that the Mississippi judgment is against Bertsch and not the dissolved Bertsch & Company. Also, this assertion is directly contrary to the facts, which are correctly stated in the first full paragraph on page 3 of the Petition, which states:

> *Bertsch & Company* did not answer, defend, plead, respond, or otherwise enter an appearance in the Mississippi state court action. Subsequently on December 16, 1993, default was entered against *Bertsch & Company* by the Circuit Clerk of Hinds County, Mississippi, pursuant to Rule 55 of the Mississippi Rules of Civil Procedure. On March 18, 1994, the Mississippi state court judge entered an Order Granting Default Judgment as to liability against *Bertsch & Company*. On July 19, 1994, a full hearing was held before the Hinds County Circuit Court. The Circuit Court for the First Judicial District of Hinds County, Mississippi, found that said court had personal jurisdiction over *Bertsch & Company*. The Mississippi trial court further found that *Bertsch & Company* had sufficient "minimum contacts"

with the State of Mississippi. Also, the Mississippi trial court heard testimony as to damages and granted a final judgment from and against *Bertsch & Company* in the amount of $4,129,286.93, with interest to accrue at 8% from entry of said judgment. (Emphasis added)

B. Contrary to Petitioner's assertion, the division of Park Corporation named Bertsch was never a/k/a Bertsch & Company.

Petitioner repeatedly refers to Park's division as "Bertsch a/k/a Bertsch & Company." This is directly contrary to the District Court's first Entry, where it held that "Park has had an unincorporated division called Bertsch; Bertsch has never been a/k/a 'Bertsch & Company.' " (14-15a) Petitioner never questioned or disputed this finding and never submitted any evidence, by affidavit or otherwise, to dispute it or to support its assertion, which is incorrect.

C. Contrary to Petitioner's assertion, Park/Bertsch did not manufacture, sell, service or repair the roller machine involved.

Petitioner on page 2 under the heading Factual Background asserts that Jefferson was injured by a roller machine due to its "defective design, and the negligence, misrepresentations, conduct and breaches of warranty(ies) of Bertsch a/k/a Bertsch & Company." This is a misstatement because, as shown above, Bertsch was never a/k/a Bertsch & Company, and Park/Bertsch did not manufacture, sell, service or repair the roller machine. As stated by the Seventh Circuit: " . . . it is uncontroverted that Park/Bertsch did not manufacture, sell, upgrade, repair or service the offending product in Mississippi." (4a) To the same effect are the District Court's opinions at 7a and 15a. The machine was manufactured and sold by Bertsch & Company in 1942 (15a).

ARGUMENT

I. The Petition Does Not Meet the Considerations Governing Review on Certiorari.

The Petition does not meet any of the considerations enumerated in Rule 10. Petitioner ignores the fact that the District Court and the Seventh Circuit Court held (1) that the Mississippi judgment was entered only against Bertsch & Company and (2) since the Mississippi court did not have jurisdiction over Park/Bertsch, the judgment entered by the Mississippi court was not entitled to full faith and credit as to Park/Bertsch (3-5a; 7-11a; 20-21a). Instead Petitioner argues that the federal courts had a limited scope of review in determining whether a judgment should be enforced, citing *Underwriters Nat'l Assurance Co. v. North Carolina Life and Accident and Health Ins., Guar., Assoc.*, 455 U.S. 691 (1982) (Petition at 9, 11). In that case, this Court reiterated the fundamental rule:

> Consequently, before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree. If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given.

455 U.S. at 705.

This is exactly what the lower courts did, as shown by their holdings that

> 1. In the Mississippi action, Jefferson sued Bertsch & Company, which it identified in the complaint as an Indiana corporation. (1a, 13a)
>
> 2. Bertsch & Company manufactured and sold the product involved in 1942. (15a) It was dissolved in 1987. (2a, 14a)
>
> 3. When the defunct Bertsch & Company did not respond to the complaint, judgment was entered against it. (2a, 15a) To

obtain this default judgment, Petitioner's attorney plainly represented to the Mississippi court that the judgment was sought against the dissolved Bertsch & Company, not Park/ Bertsch. (4a, 11a, 21a)

4. Petitioner sought to enforce this judgment against Park/ Bertsch (2a). Park Corporation is a Nevada corporation, and neither Park nor its division were ever dissolved (15a). Park/Bertsch and Bertsch & Company are two distinct companies (5a).

5. Park/Bertsch did not manufacture, sell, repair or service the machine involved and did not commit a single act in Mississippi with regard to the product. (4a, 9a, 11a, 21a).

6. In the Mississippi Action, jurisdiction over Bertsch & Company was based on the tort prong of its long-arm statute. (1a, 4a, 14a)

7. The Mississippi court made no findings regarding its personal jurisdiction over Park/Bertsch. (4a)

8. The Mississippi court did not have personal jurisdiction over Park/Bertsch. (5a, 7a, 11a)

9. Since there was no personal jurisdiction over Park/ Bertsch , the judgment is not entitled to full faith and credit. (5a, 7a)

Ignoring the holdings that the Mississippi court did not have personal jurisdiction over Park/Bertsch and that the judgment was entered only against Bertsch & Company, Petitioner cites *Matsushita Elec. Industrial Co. Ltd. v. Epstein,* 116 S. Ct. 873 (1996), for the proposition that the Full Faith and Credit Act directs courts to treat a state court judgment the same as it would receive in the state rendering it and that federal courts may not employ their own rules in determining the effects of state judgments, but must employ the rules of Mississippi. (Petition at 5). This is exactly what the Seventh Circuit did. It noted that the

Mississippi courts have held that if the court rendering the judgment did not have jurisdiction over the person, that judgment was not entitled to full faith and credit (citing *Sanders v. Humphrey,* 735 F. Supp. 209 (S.D. Miss. 1990) (holding that a Mississippi state court was not required to give full faith and credit to a Louisiana judgment where the rendering court did not have personal jurisdiction over the Mississippi resident); *Peters v. Peters,* 560 So. 2d 722, 723 (Miss. 1990) (holding that "if the court is without jurisdiction—subject matter or personal—no one is bound by anything the court may say regarding the (de)merits of the case"). (3a)

Petitioner does not address the question of full faith and credit where the court entering the judgment lacked jurisdiction over the person. The *Matsushita* case only ruled on the question whether full faith and credit must be applied to a state court judgment approving a class action settlement where the settlement released claims which were within the exclusive jurisdiction of the federal courts. The parties who were contesting full faith and credit were members of the class and never opted out of the class. Thus, being parties to the underlying case, they were bound by the state court settlement.

Likewise, *Kremer v. Chemical Construction Corp.,* 456 U.S. 461 (1982) (cited on p. 5) did not involve the issue of jurisdiction. That case held that since Kremer had litigated his claim of employment discrimination with state agencies and in the state's courts, their decisions against Kremer were res judicata in a subsequent federal suit based on Title VII.

Petitioner's argument that Park/Bertsch should have gone to the Mississippi court to set aside the default judgment misses the mark. As noted in the comments to Rule 55 of the Mississippi Rules of Civil Procedure, only the defendant can seek to set aside a default judgment, and he must do so under Rule 60(b). However, Rule 60(b) may only be invoked by the party against

whom the judgment is rendered or that party's representative. As discussed above, the Mississippi judgment was rendered only against Bertsch & Company. It was not against Park/Bertsch. Therefore, Park/Bertsch had no duty or obligation to seek to set it aside and, under the Rules, had no standing to do so.

Because the Seventh Circuit applied the appropriate law in determining that the judgment is not entitled to full faith and credit, the writ does not meet any of the criteria specified in Rule 10, and there is no compelling reason to grant the writ.

II. There Was No Misnomer.

Even though all of the pleadings in the Mississippi action named only Bertsch & Company, the final judgment was entered only against Bertsch & Company, based on jurisdiction over Bertsch & Company having committed a tort in Mississippi, and Petitioner's attorney swore under oath that Petitioner was seeking a judgment against the "dissolved" Bertsch & Company, Petitioner argues that suing Bertsch & Company was a misnomer, citing *Campbell & Campbell v. Pickens Bank*, 99 So. 378 (Miss. 1924). The District Court aptly demonstrated why this case is not applicable, when it held:

> In *Campbell*, the correct party was incorrectly named and served. This is a classic example of a "misnomer." In the instant case, however, the Plaintiff certified to the Mississippi court that it was seeking judgment against "Bertsch & Company" a "dissolved" corporation. Therefore, when Bertsch , an unincorporated division of Park, was served, it was the incorrect party being served with process labeled with the correct party's name. This is not a misnomer. Misnomer or not, however, the key distinction between *Campbell* and the instant case is that Pickens Bank is subject to in personam jurisdiction by virtue of its presence in the forum. Indeed, Plaintiff's counsel in the instant case conceded at

> the hearing that *Campbell* was a service-of-process case and not a personal-jurisdiction case.

(See11a)[3]

Likewise, in *Rich v. Nevels*, 578 So. 2d 609 (Miss. 1991), the defendant was subject to personal jurisdiction. In that case, Nevels was attacked and injured when she was burglarized as a resident of a boarding house owned by Wilma Rich, whom Nevels sued. The summons incorrectly identified Wilma Rich as Wilma Richie. Wilma Rich acknowledged to the sheriff that she was indeed the person named in the summons. The sheriff asked her if she was Wilma Richie and she said yes. Rich also admitted that she knew Nevels and remembered the attack. Therefore, the court concluded that the evidence did not support a claim that the slight misnomer misled Rich. 578 So. 2d at 613.

Unlike *Nevels*, Park/Bertsch never acknowledged that it was the Bertsch & Company named in the summons, and because Park Corporation did not manufacture the machine, it had no knowledge of any of the matters asserted in the complaint in the Mississippi action. Therefore, the *Nevels* case has no bearing on this case, which factually is clearly distinguishable.

Even if, as Petitioner claims, there was a misnomer, then he had a duty to correct it in the Mississippi action. In *Rich v. Nevels, supra*, and in *Southern Trucking Service, Inc. v. Mississippi Sand and Gravel, Inc.*, 438 So. 2d 321, 323 (Miss. 1986), the courts held that if there is a misnomer, the proper procedure is for the party who made the misnomer to move to correct that misnomer in the court in which the suit is pending. This was never done by Petitioner.

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[3]The Seventh Circuit in its opinion did not discuss the *Campbell* case, but did find that Petitioner plainly represented to the Mississippi Court that the judgment was sought against the dissolved Bertsch & Company as opposed to asking a judgment against Park/Bertsch. (4a)

III. The Seventh Circuit Was Correct in Holding that the Mississippi Court Had No Jurisdiction Over Park/Bertsch.

A review of the opinion of the Seventh Circuit shows that it applied the correct law to the facts and found the Mississippi judgment was not entitled to full faith and credit because the court had no jurisdiction over Park/Bertsch. The conclusion of the Seventh Circuit is correct because:

- Petitioner is unable to demonstrate that Park/Bertsch was subject to suit under the Mississippi long-arm statute. (4a)

- In the Mississippi action, personal jurisdiction over Bertsch & Company was based on the tort prong of the long-arm statute. (4a)

- The tort complained of in the Mississippi action did not arise from any acts committed by Park/Bertsch. (4a)

- The Mississippi court made no findings regarding personal jurisdiction over Park/Bertsch. (4a)

- Petitioner plainly represented to the Mississippi court that the judgment was sought against the "dissolved" "Bertsch & Company", and not against Park/Bertsch. (4a)

- Since it was uncontroverted that Park/Bertsch did not manufacture, sell, upgrade, repair or service the machine involved, Park/Bertsch did not commit any act in Mississippi relevant to the underlying tort. (4a)

- The Mississippi court's finding of personal jurisdiction over Bertsch & Company did not render personal jurisdiction over Park/Bertsch. (5a)

- The Mississippi court did not have personal jurisdiction over Park/Bertsch. (5a)

- The judgment is entitled to full faith and credit only against Bertsch & Company. (5a).

CONCLUSION

For all of the above reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,
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APPENDIX

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

JERRY JEFFERSON — PLAINTIFF

vs. — CIVIL ACTION NO. 93-76-193

BERTSCH & COMPANY, WESTINGHOUSE ELECTRIC CORPORATION, INC., GENERAL ELECTRIC COMPANY, FURNAS ELECTRIC COMPANY AND DOES 1-20 — DEFENDANTS

AFFIDAVIT OF DENNIS C. SWEET III

STATE OF MISSISSIPPI

COUNTY OF HINDS

Dennis C. Sweet III, being duly sworn, states under oath as follows:

1. I am an adult resident citizen of Hinds County, Mississippi, and have personal knowledge of the facts set forth herein, am competent to testify to the facts set forth herein, and am an attorney for the Plaintiff, Jerry Jefferson.

2. On August 9, 1993, pursuant to Rule 4 (c)(5). Defendant Bertsch & Company was served with a copy of the summoms and complaint herein, by certified mail. Because Bertsch & Company was administratively dissolved by the Indiana Secretary of State in 1987, the summons and complaint was served upon an Officer or Managing Agent. As evidenced by a copy of the envelope attached hereto as Exhibit "A", the summons and complaint was "Refused." Attached hereto as Exhibit "B" is a true and correct copy of the executed Summons and Notice And Acknowledgment For Service By Mail which was served upon Defendant Bertsch & Company.

3. Service upon Defendant Bertsch & Company became effective on August, 9, 1993, this being the date in which the certified letter containing the summons and compliant was delivered.

4. More than thirty (30) days have elapsed since the date Defendant Bertsch & Company was served with the summons and complaint.

5. Defendant Bertsch & Company has failed to plead, respond, answer or otherwise defend as to the Plaintiff's Complaint, or serve a copy of any pleading upon the Plaintiff's counsel.

6. This affidavit is executed in accordance with Rule 55(a) of the Mississippi Rules of Civil Procedure for the purpose of enabling the Plaintiff to obtain an entry of default against Defendant Bertsch & Company for the latter's failure to plead or otherwise defend the Plaintiff's Complaint.

FURTHER AFFIANT SAYETH NOT.

/s/ Dennis C. Sweet III

DENNIS C. SWEET III

Attorney for JERRY JEFFERSON

Sworn to and subscribed before me personally on this the 16th day of December, 1993.

/s/ Virginia Kewery

Notary Public

My Commission Expires:

NOTARY PUBLIC STATE OF MISSISSIPPI AT LARGE.
BY COMMISSION EXPIRES: Feb. 2, 1997.
BONDED THRU NOTARY PUBLIC UNDERWRITERS.